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No. 88-830

IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1988

QUALITY INN SOUTH, Manibhai Patel, Dilip Patel, Sumani Corp., Inc.,
Petitioners

v.

RAJNI J. PATEL,
Respondent

REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

CASES

Doe v. Reivitz, 830 F.2d 1441 (7th Cir. 1987) 6, 7

Immigration and Naturalization Service v. Delgado, 466 U.S. 210 (1984) 2

Mathews v. Diaz, 426 U.S. 67 (1976) 3

In re Reyes, 814 F.2d 168 (5th Cir. 1987), *cert. denied, Griffin and Brand of McAllen, Inc. v. Reyes*, 108 S. Ct. 2901 (1988) 7

Sure-Tan v. National Labor Relations Board, 467 U.S. 883 (1984) 1, 7

United States v. Lopez, 521 F.2d 437 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975) 2

STATUTES

Fair Labor Standards Act of 1938, *as amended*, 29 U.S.C. §§ 201-219 (1982 & Supp. IV 1986) . . . 1, 5

Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.) (Supp. IV 1986) . . . . . passim

8 U.S.C. § 1186 6

8 U.S.C. § 1255 3

8 U.S.C. § 1255a 2

8 U.S.C. § 1324 2

8 U.S.C. § 1324a 2, 5

8 U.S.C. § 1325 3

Sec. 111 4
Sec. 115 4
Sec. 121 2
18 U.S.C. § 1546 (1982 & Supp. IV 1986) 3

OTHER

H.R. 3810, 99th Cong., 1st Sess. (1985) 6
H.R. Rep. No. 682 (Part I), 99th Cong., 2d Sess. (1987) 6
Immigration Reform and Control Act of 1985, S. Rep. No. 132, 99th Cong., 1st Sess. (1985) . . 2, 6
Sup. Ct. R. 17.1(c) 7

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PETITIONERS' REPLY MEMORANDUM

Respondent does not understand the scope of the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.) (Supp. IV 1986) [hereinafter IRCA]. Surprisingly, neither does amicus curiae United States Department of Labor. Both fail to understand this Court's prior cases involving the rights of illegal aliens to government largesse, or how those cases affect the decision below.

These failures to understand are reflected in the failure of either opposing brief to deal substantively with the effect of the IRCA on prior cases and legal theories. As a result, neither opposing brief adequately deals with the question of remedies available in a private action brought under the Fair Labor Standards Act by an illegal alien. Neither opposing brief adequately deals with the question of how a court should apply labor-law-related remedies to interfere least with the immigration laws. *Sure-Tan v. National Labor Relations Board*, 467 U.S. 883 (1984).

Thus, neither opposing brief provides valid reasons why this Court should not grant the petition for a writ.

I. THE IRCA IS A COMPREHENSIVE ATTEMPT TO REMOVE ALL ILLEGAL ALIENS FROM THE UNITED STATES.

Both respondent and amicus erroneously imply that the IRCA is so limited in its sweep as to allow some avenue for illegal aliens to remain in the United States. Amicus, for example, while noting that the IRCA "comprehensively amended the INA to include new measures for controlling illegal immigration to the

United States," contends that the IRCA did not criminalize the acceptance of employment by illegal aliens in this country. Brief of U.S. Department of Labor as Amicus Curiae at 3 [hereinafter Amicus].

Taking such a narrow view of the IRCA distorts the tremendous effect of the 1986 law. There is no longer any legitimate means by which an illegal alien can remain in this country. A review of even a few of the provisions of IRCA illustrates how miserly are respondent's and amicus' concepts of the effect of the IRCA.

A. Employer Sanctions

As all parties recognize, the IRCA made it illegal to hire an illegal alien. 8 U.S.C. § 1324a.

B. Harboring and Shielding Illegal Aliens

Neither respondent nor amicus recognized the changes to 8 U.S.C. § 1324 (as distinguished from 8 U.S.C. § 1324a, which IRCA created). That section, which criminalizes "conduct tending substantially to facilitate an alien's remaining illegally in this country," *United States v. Lopez*, 521 F.2d 437, 441 (2d Cir.), *cert. denied*, 423 U.S. 995 (1975), was substantially strengthened by IRCA. The amendment weakened the so-called Texas Proviso, which had for so long stymied this Court's analysis of immigration law enforcement. *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 240 (1984). The authors of the amendment were well aware of the cases interpreting this section and intended to expand and clarify coverage of employers of illegal aliens. *Immigration Reform and Control Act of 1985*, S. Rep. No. 132, 99th Cong., 1st Sess. 29-30 (1985).

C. Fraudulently Obtaining Employment

In addition, the IRCA also criminalized an alien's false attestation or use of documents to obtain employment. The IRCA amended 18 U.S.C. § 1546 to criminalize attempts to circumvent the prohibition on hiring.

D. Denial of Welfare Benefits

Further, the IRCA substantially restricted an illegal alien's ability to obtain social services benefits.[1] IRCA established a comprehensive method to remove illegal aliens from state welfare rolls. IRCA, sec. 121.

E. Denial of Adjustment of Status

IRCA prohibited many illegal aliens from legalizing their status. Although IRCA generously gave millions of illegal aliens amnesty, 8 U.S.C. § 1255a, at the same time, it restricted eligibility for amnesty to those illegal aliens with many years' residence in this country. In addition, aliens who entered illegally or violated the terms of their entry were not allowed to adjust to permanent residence after the passage of IRCA. 8 U.S.C. § 1255(c)(2).

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1 This court has long held that illegal aliens do not have constitutional rights to social services: "Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the bounty which a conscientious sovereign makes available to its own citizens and some of its guests." *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

F. Unlawful Entry

IRCA continues the criminalizing of entry into the United States without inspection and admission by immigration officers. 8 U.S.C. § 1325.

G. Congressional Findings and Declarations

Finally, Congress twice declared its resolve that illegal immigration be stopped. First, Congress found that it is an essential element of the program of immigration control that the "INS and . . . other appropriate Federal agencies . . . prevent and deter the illegal entry of aliens into the United States and the violation of the terms of their entry." IRCA, sec. 111. Then Congress declared its resolve that "the immigration laws of the United States should be enforced vigorously and uniformly." IRCA, sec. 115.

Is it consistent with IRCA that one government agency should strive "vigorously and uniformly" to "prevent and deter" illegal immigration while at the same time another branch of government is providing illegal aliens with the financial means to remain in this country? The Eleventh Circuit felt its decision below allowing an illegal alien to maintain an action for thousands of dollars in back pay and liquidated damages reflected a "seeming anomaly", Petitioner's Brief at Appendix B10; a better view might be that the Eleventh Circuit misunderstood the sweep of the changes made by the IRCA.

Respondent and amicus similarly miss the comprehensive nature of these changes and declarations. They thereby miss the essential point of IRCA: illegal aliens are not to be allowed to remain in this country. Any activity by a government agency to enforce a labor-related law should not encourage or allow an illegal alien to remain in this country. To do otherwise would

undercut the complex and comprehensive structure created by the IRCA.

II. RESPONDENT'S AND AMICUS' VIEW OF THE ROLE OF THE DEPARTMENT OF LABOR IS INCONSISTENT WITH THE PLAIN LANGUAGE OF THE IRCA.

Respondent's and amicus' views on the role of the Wage and Hour Division of the Department of Labor are inconsistent with the plain language of the IRCA. Both respondent and amicus contend that Congress intended the Wage and Hour Division to increase its enforcement of the FLSA. Respondent's Brief in Opposition at 6 [hereinafter Opp.]; Amicus at 11. Seemingly, under respondent's and amicus' legal reasoning, this increase is to occur at the expense of, or at least completely independent of, the enforcement of the new prohibition on hiring illegal immigrants.

In fact, both respondent and amicus contend that statutory language authorizing more funds to the Wage and Hour Division, IRCA, sec. 111(d), is a signal that Congress intended more FLSA enforcement. For example, amicus U.S. Department of Labor, which ought to know what in a statute affects it, contends: "By providing increased funding . . . Congress obviously intended the Secretary to enforce the FLSA's wage and hour requirements with respect to illegal aliens." Amicus at 11.

No such direction appears in the provision of IRCA that authorizes additional funding. There is only the statement that the additional funds are provided "in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." IRCA, sec. 111(d). The only relevant explicit reference to the Department of

Labor in the IRCA, however, is that employers retain employment verification records for inspection by Department of Labor officials. 8 U.S.C. § 1324a(b)(3). There is no mention of wage and hour records in the IRCA. Thus, contrary to the position of respondent and amicus, the job of the Department of Labor is to help enforce the prohibition on hiring illegal aliens.[2]

The Senate Committee Report buttresses this interpretation when it declares that the additional funds are "for enforcement activities in connection with the bill." S. Rep. No. 132 at 13. The House Committee reports and proposed bills, cited in other contexts by respondent and amicus, contain no specific authorization language for the Wage and Hour Division. *See* H.R. 3810, 99th Cong., 1st Sess., sec. 111 (1985); H.R. Rep. No. 682 (Part I), 99th Cong., 2d Sess. 7, 11 (1986).

III. THIS CASE IS APPROPRIATE FOR REVIEW.

Both respondent and amicus misunderstand the need for review by this Court. In support of the proposition that the circuits are not in conflict, both opposing briefs cite many cases (most handed down prior to the 1986 passage of IRCA) in which lower courts have provided labor-law related and other benefits to illegal aliens. Opp. at 8; Amicus at 3. These cases, however, are examples of the need for guidance from

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2 For an example of an IRCA provision directing the Department of Labor to monitor and protect wages and working conditions for American workers, see 8 U.S.C. § 1186(a)(1)(B) and (g) (1986).

this Court on an important topic misunderstood by the lower courts. Sup. Ct. R. 17.1(c).

It is precisely because the lower courts are uniformly ignoring the prior decisions of this Court that this case needs to be reviewed. In several cases, lower court panels have been split on the essential question of the rights of illegal aliens. *Compare Doe v. Reivitz*, 830 F.2d 1441 (7th Cir. 1987) (holding that agency may not deny family benefits, even though parents were illegal aliens and thus ineligible to register for work, as required by the program) *and In re Reyes*, 814 F.2d 168, 180 (5th Cir. 1987), *cert. denied*, *Griffin and Brand of McAllen, Inc. v. Reyes*, 108 S. Ct. 2910 (1988) (noting that despite prohibition of employment in Migrant and Seasonal Agricultural Worker Protection Act, illegal status was irrelevant under both that act and the Fair Labor Standards Act) *with Doe v. Reivitz*, 830 F.2d 1441, 1451 (Wood, J., dissenting) (noting contradiction between court's holding and the congressional scheme to deter illegal immigration) *and Reyes*, 814 F.2d 168, 171 (Jones, J., dissenting) (arguing that previously no court has allowed illegal aliens to recover statutory remedies under the FLSA).

It is notable that respondent barely mentions this Court's decision in *Sure-Tan*. Opp. at 8, n. 3. In *Sure-Tan*, this Court held that illegal aliens were employees covered by the National Labor Relations Act in cases of explicit anti-union bias, 467 U.S. 883; nevertheless, remedies available to United States citizens in such cases would not be available to illegal aliens. *Id.* at 902-3. In addition, by endorsing the Ninth and Second Circuits' expansive interpretations of *Sure-Tan* on back-pay and other mechanisms that allow illegal aliens to remain in the United States, respondent and amicus again ignore the clear implications of the comprehen-

sive IRCA program to eliminate illegal immigration and remove illegal immigrants from the United States.

CONCLUSION

THEREFORE, Petitioners respectfully request this Court to issue the writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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